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No. 93-1947

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

LARRY D. BARNETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court in petitioner's prior criminal prosecution made a factual finding that the full amount of the government's damages was $7 million.

2. Whether the criminal prosecution of petitioner and the partial restitution ordered as part of the criminal sentence preclude the government from recovering its actual damages from petitioner in a subsequent civil action.

3. Whether the Double Jeopardy Clause prohibits the government from recovering civil penalties and a statutory multiplier that are reasonably proportionate to the government's losses and costs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B49) is reported at 10 F.3d 1553. The opinion of the district court (Pet. App. A1-A15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1994. On March 22, 1994, Justice Kennedy extended the time within which to file a petition for certiorari to and including May 2, 1994. On April 14, 1994, Justice Kennedy further extended the time within which to file a petition for certiorari to and including June 6, 1994. The petition was filed on June 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1977 and 1981, petitioner and his associates participated in a complex conspiracy to defraud the government in connection with a contract he obtained for providing laundry services for the United States Army in Germany.[1] Pet. App. B2. A jury convicted petitioner and his co-conspirators of a number of offenses, including racketeering, mail fraud, bribery, false statements, income tax evasion, and misapplication of government funds. *Id.* at B3.

At sentencing, the United States sought restitution of $15 million in excess profit. Pet. App. B3. Petitioner contended that his illegal profit was at most $6.8 million. *Ibid.* Declining to resolve the dispute, the district court ordered petitioner to pay restitution of $7 million, which was approximately the amount of his known net worth. *Id.* at B3, B23. The court also sentenced petitioner to five years' imprisonment and five years' probation. *Id.* at B3-B4.

The Eleventh Circuit affirmed petitioner's conviction and sentence. The court noted in its opinion that "the evidence introduced at trial established that the conspiracy netted approximately fifteen million dollars in excess profits from the German laundry contract alone." See *Barnette I*, 800 F.2d at 1571-1572.

2. The government subsequently filed the present civil suit. In a complaint that closely tracked the criminal indictment of petitioner and his co-conspirators, the government asserted claims under a number of federal statutes, including the False Claims Act, 31 U.S.C. 3729. Pet. App. B4-B5. The government claimed actual

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[1] The details of petitioner's crimes are recounted in *United States* v. *Barnette* (*Barnette I*), 800 F.2d 1558, 1560-1566 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987).

damages of at least $15 million, and sought recovery of statutory multiple damages, plus relevant civil penalties. *Id.* at B5; see also *id.* at B50 (summarizing bases for government's claims).

The district court granted petitioner's motion for summary judgment on the ground that the criminal restitution order of $7 million estopped the government from relitigating the amount of its damages in the instant civil action. Pet. App. A6. The court further concluded that in light of *United States* v. *Halper*, 490 U.S. 435 (1989), the Double Jeopardy Clause of the Fifth Amendment barred the government "from bringing this civil action which clearly alleges conduct identically prosecuted in a prior criminal proceeding." Pet. App. A13.

3. The court of appeals reversed the district court's grant of summary judgment in favor of petitioner and remanded the case for further proceedings to determine the amount of the government's losses. Pet. App. B1-B50.

As a threshold matter, the court found that the $7 million restitution order did not in fact constitute a judicial determination of the extent of the government's loss. The court noted that the sentencing judge had expressly disavowed any intention of making specific findings regarding the total amount of the government's loss. Pet. App. B10-B13. The court also emphasized that restitution orders serve a different purpose from civil damages, since restitution must take into account not only the victim's injury, but also factors such as the defendant's financial resources and the needs of his dependents. *Id.* at B13-B15. Finally, the court explained that the amount of the restitution order was approximately equal to petitioner's known net worth, see *id.* at B23, and that its review of the record revealed that

the sentencing court had simply determined "that [petitioner] could pay that amount," while "le[aving] final resolution of the Government's damages claim to the ensuing civil case." *Id.* at B15.

The court also rejected petitioner's argument that the sentencing judge's failure to explain the restitution order pursuant to the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3663-3664, meant that the order was intended to make the government whole. Pet. App. B19. Although at the time of sentencing the VWPA required a court to explain a failure to order full restitution, see *id.* at B18, the court found that three of the four concurrent $7 million restitution orders were not governed by the VWPA, because those orders related to crimes that occurred before the effective date of the VWPA. *Id.* at B19-B20. The fourth restitution order should have been governed by the VWPA, but the court found that the government had mistakenly informed the sentencing court that the fourth order was not governed by the VWPA, and petitioner had failed to contest that assertion. *Id.* at B21. Moreover, the sentencing court's statements indicated that it was unaware of the requirements of the VWPA. *Id.* at B21-B22. Accordingly, nothing that occurred in the sentencing court suggested that the $7 million restitution order represented a factual finding concerning the full scope of the government's damages.

The court of appeals further held that the Double Jeopardy Clause does not prohibit any award of civil penalties in excess of the restitution order, but only those awards "so grossly disproportionate to the * * * loss suffered as to constitute deterrence or retribution instead of compensation." Pet. App. B26. While remanding for a factual determination of the extent of the government's loss, the court nonetheless compared

the asserted loss to the amount sought by the government in this case, in order to determine whether *Halper* precluded recovery as a matter of law. *Id.* at B28-B29. The court found that "the ratio between the amount that the Government is seeking and its direct loss is only 3.2 to 1—strikingly less than the 222 to 1 figure that so shocked the *Halper* Court." *Id.* at B34. While acknowledging that investigation and prosecution costs remained to be determined on remand, the court nonetheless found that the ratio between the total recovery sought and the government's total losses, including such costs, "would not exceed 3.2 to 1 * * * [and] will never approach *Halper*'s 8 to 1 ratio." *Id.* at B34-B35. Noting that the ratio between the government's total costs, if proven on remand, and its recovery in this case would at most approximate the fixed penalty and double damages explicitly approved in *Halper*, the court concluded that the penalties sought by the government were rationally related to the government's asserted loss, and therefore were not barred under *Halper*. *Id.* at B35.

Finally, the court rejected petitioner's argument that res judicata barred the present suit because the government failed to raise its civil claims during the criminal proceedings. The court pointed out that petitioner's reasoning would have entirely barred the civil action in *Halper* itself, in which the civil action followed a criminal prosecution for the same conduct. Pet. App. B43. The court further reasoned that the VWPA, 18 U.S.C. 3579(e)(2) (1982), expressly contemplates successive criminal and civil proceedings, and noted that petitioner himself relied on the existence of the pending civil action in attempting to reduce the amount of restitution. Pet. App. B44-B45. To bar this action "on the ground that the Government has already

had one bite at the apple," the court found, "would allow [petitioner] to have the Government's apple and eat it too." *Id.* at B45.

ARGUMENT

1. Petitioner renews his argument (Pet. 26) that the sentencing court determined that the government's damages were $7 million, and that the government is therefore precluded from basing its claim on a contention that its damages were higher. After a thorough review of petitioner's sentencing proceedings, the court of appeals rejected petitioner's premise that such a factual finding had been made. As the court of appeals explained, the district court did not expressly make such a finding, but instead disavowed having made it. Although perhaps the court should have made a finding about the extent of the government's damages in light of the VWPA's requirement that a court explain a failure to grant full restitution, the district court's failure to do so was thoroughly explicable in terms of the court's understanding of the statutory requirements at the time of the sentencing. In any event, further review of the fact-bound question of whether the sentencing court made the alleged finding is not warranted.[2]

2. Petitioner argues (Pet. 40-44) that, under the doctrine of res judicata, the government may not pursue a damages remedy against a defendant after it has prosecuted that defendant criminally. As the court of appeals noted, however, *Halper* itself involved a civil

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[2] Petitioner also appears to challenge the calculation of the government's loss, arguing that the government did not in fact incur any monetary loss (Pet. 33), and that any loss would not in any event be measured by petitioner's excess profits (Pet. 27). Such arguments are properly addressed to the district court on remand.

action that followed a criminal prosecution, and this Court's remand in *Halper*, see 490 U.S. at 452, would have been pointless if a prior criminal prosecution precludes the government from advancing a civil claim for damages. In addition, Congress specifically recognized in the VWPA that a criminal prosecution could be followed by a subsequent civil damages action. See, *e.g.*, 18 U.S.C. 3663(e)(2) (providing for set off of criminal restitution against subsequent civil damages); 18 U.S.C. 3664(e) (providing that criminal conviction has preclusive effect as to elements of underlying crime in subsequent civil action by victim). Petitioner provides no reason to disregard Congress's intent that the existence of the restitution remedy not preclude a subsequent civil action for damages.

3. Petitioner claims (Pet. 9-25) that an award of civil penalties plus a statutory multiplier in this case would constitute a double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment. As this Court recognized in *Halper*, however, an otherwise-civil sanction does not rise to the level of punishment unless it "bears no rational relation to the goal of compensating the Government for its loss." 490 U.S. at 449-450. This Court explained that its holding in *Halper* represented "a rule for the rare case," *id.* at 449; the facts of *Halper* involved a False Claims Act award more than 220 times greater than the government's actual loss (and eight times greater than its total loss, including ancillary costs). See *id.* at 439, 452. The Court noted that "in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." *Id.* at 449.

The court of appeals applied those principles, and concluded that if the government is able to prove its loss allegations on remand, a damages award in the full

amount sought by the government would not violate the Double Jeopardy Clause. Pet. App. B33-B36. In contrast to the 220:1 ratio in *Halper*, the amount the government seeks in this case is only 3.2 times the direct loss allegedly suffered by the government. The recovery sought appears even more reasonable if one employs the ratio of recovery to losses and ancillary costs, as petitioner suggests (Pet. 12); the government's ancillary costs of investigation and prosecution will bring the ratio even closer to the fixed sum plus double damages expressly approved in *Halper*. 490 U.S. at 446.[3]

Petitioner argues (Pet. 18-19) that the damages sought are inherently punitive because he "paid his entire net worth" to satisfy the restitution order. However, *Halper* teaches that a civil sanction does not constitute punishment unless that sanction is grossly disproportionate to the harm caused: The severity of any previously imposed criminal sanction is irrelevant. In any event, the VWPA explicitly provides (and the government conceded below) that the criminal restitution award would be set off against any civil damages awarded. 18 U.S.C. 3663(e)(2); see Pet. App. B5-B6.

Finally, petitioner claims that there is a conflict between the decision below and *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993). In that case, the Ninth Circuit applied a *Halper* analysis to determine whether a state

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[3] At least two lower courts have approved damage awards under *Halper* with significantly higher sanction-to-damage ratios than respondent seeks in this case. See *United States* v. *Amiel*, 813 F. Supp. 958, 962 (E.D.N.Y.), aff'd, 995 F.2d 367 (2d Cir. 1993) (finding that a ratio of 18 to 1 between sanctions and actual losses was not punitive); *United States* v. *Pani*, 717 F. Supp. 1013, 1019 (S.D.N.Y. 1989) (holding that a recovery of $32,460 for claims causing $1280 in damage, a ratio of approximately 25 to 1, was not "overwhelmingly disproportionate" under *Halper*).

tax on marijuana assessed following a criminal prosecution must be regarded as compensatory or penal for double jeopardy purposes. In affirming the judgment of the Ninth Circuit in *Kurth Ranch*, however, this Court held that "subjecting Montana's drug tax to *Halper*'s test for civil penalties is * * * inappropriate," because "tax statutes serve a purpose quite different from civil penalties." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994). The Ninth Circuit's application of *Halper* in *Kurth Ranch* accordingly has no continuing validity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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